

**OPINION
74-312**

October 15, 1974 (OPINION)

Mr. Albert J. Hardy
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First National Bank Building
P. O. Box 370
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Dear Mr. Hardy:

This is in response to your letter of 13 September 1974 with regard to recording of an "Abstract of Instrument" that a coal company wishes to have recorded in your County Register of Deeds office.

You indicate that your Register of Deeds is quite concerned about recording such a document as it is not the actual lease but merely an abstract of same. You enclosed a copy of the document.

The document is entitled "Abstract of Instrument" commences with "Know all men by these presents, that there exists a Coal Lease" then goes on to describe date, parties, legal description of premises concerned, states that the document, among other things, grants unto a named coal company certain exclusive rights for exploration for the mining of coal and lignite, describes the primary term of the coal lease, the "thereafter" clause thereof gives a name and address where it states a full and complete copy of the instrument abstracted can be obtained, without cost, and is signed by apparently the parties to the instrument described therein, (though such signatures are not acknowledged before a notary public and such acknowledgement showing on the "Abstract of Instrument"). The "Abstract of Instrument" bears a date apparently identical to the date of the instrument purported to be abstracted therein.

As you are aware, section 47-19-01 of the North Dakota Century Code provides:

"Instruments Entitled to Record. - Any instrument affecting the title to or possession of real property may be recorded as provided in this chapter."

Our recording system is purely the creature of statute. (See 66 Am. Jur.2d. 369, Records and Recording Laws, Section 47). Thus if recording of a particular paper is permitted by the statutes it may be recorded - if recording of a particular paper is not permitted by the statutes it may not be recorded, and attempts to record papers not authorized by the statutes are not given effect as recorded instruments. You might see the various cases cited in the annotations to chapter 47-19 as printed in the North Dakota Century Code, to this effect, particularly under such sections as 47-19-03.

"Webster's New Twentieth Century Dictionary Unabridged Second Edition" defines the noun "instrument" as:

"Instrument (instrumentation, a tool, or tools, implement, stock in trade, furniture, dress, fir instruere, to furnish, equip; in and struere to pile up, arrange).

1. (a) a thing by means of which something is done; means; (b) a person used by another to bring something about.
2. a tool or implement, especially one used for distinct work or for scientific or artistic purposes.
3. any of various devices producing musical sounds as a piano, violin, oboe, etc.
4. in law, a formal document, as a deed, contract, etc., instrument flying, the navigation of an aircraft by the use of instruments, instrument panel, a board with instruments, gauges, etc., mounted on it as in an automobile or airplane."

The dictionary defines the noun "abstract" as:

1. a summary or epitome containing the substance, a general view or the principle heads of a treatise or writing.
2. in grammar, a noun used as a general term, an abstract noun, as virtue, goodness, paternity.
3. in pharmacy, a solid preparation in which two parts of the drug are represented by one part of the abstract which is compounded with milk and sugar. Abstracts are double the strength of the fluid extract.
4. that which is abstract' an abstract idea, etc.

abstract of title a summary of the successive title deeds to a piece of real estate.

in the abstract in a state of separation; as a subject considered in the abstract, i.e., without reference to particular persons or things.

Synonym abridgment, summary, digest, synopsis, compendium, epitome."

Black's Law Dictionary, Revised Fourth Edition defines the noun "abstract" at page 24 as:

"A less quantity containing the virtue and force of a greater quantity; an abridgment, Miller v. Kansas City Light and Power Company C.C.A. Mo. 13 F. 2d. 723. A transcript is generally defined as a copy and is more comprehensive than an abstract. Harrison v. Manufacturing Company, 10 S.C. 278, 283. Summary or epitome or that which comprises or concentrates in itself the essential qualities of a larger thing or of several things. Robbins Inv. Company v. Robbins, 49 Cal. App. 2d. 446, 122 P. 2d. 91, 92."

Thus the problem here with identifying the document in question as an instrument affecting the title to real property (as specified in the above quoted section 47-19-01) is that it does not purport to be the "tool" the "means" the "thing" by which the title to real property is affected but rather purports to be something less than a full copy thereof, a "summary" of the substance of the "instrument" itself. Thus this document does not purport to be a "mineral lease" rather it is entitled "Abstract of Instrument", it does not purport to "lease" the minerals rather it recites "that there exists a Coal lease" and then goes on to describe it.

The Courts have been quite meticulous in not allowing the recording of "copies" rather than the "instrument" itself in the absence of statutes providing therefor. Thus we find in 76 C.J.S. 118, Records, Section 10 the following:

" * * * Ordinarily only the original instrument and not a copy thereof is entitled to be recorded but there is also authority that a 'testimonio' or 'second original' is entitled to record. It has been stated to be the duty of the recording officer to refuse to record an instrument which shows clearly on its fact that it is not entitled to recording."

Patton on Titles Second Edition, Volume 1 pages 18 and 19, section 6 informs us:

" * * *

On a similar basis of expediency, the statutes usually make provision for the recording of an authenticated copy. But in the absence of statute, it is held that the original instrument only, and not a copy, is entitled to be recorded. * * * "

Patton gives quite a list of citations, examples of statutes from various states (not including this state) authorizing, prescribing authentication, etc., that do specifically by statute authorize recording of such authenticated copies.

While we do not find cases construing whether an "abstract of instrument" can be considered an instrument. we do find Lattin v. Giletee, 30 p. 545, 95 Cal. 317, 29 Am. St. Rep. 115, and Waters v. Pearson 114 N.W. 1026, 1032, 163 Iowa 391 indicating that an "Abstract of Title" is not an "instrument" within the meaning of the statutes there concerned.

There is also another basis on which the document here concerned cannot affect the title to real property, that is the Parol Evidence Rule. As stated at 30 Am. Jur. 2d., pages 149-153 Evidence Section 1016 (in part):

"The well established general rule is that where the parties to a contract have deliberately put their engagement in writing in such terms as import a legal obligation without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the entire engagement of the parties and the extent and manner of their undertaking have been reduced to writing and all parol evidence of prior or

contemporaneous conversations or declarations tending to substitute a new and different contract for the one evidenced by the writing is incompetent. State otherwise, the intention of the parties as evidenced by the legal import of the language of a valid written contract cannot ordinarily be varied by parol of a different intention. A narrower statement of the rule appears in some cases to the effect that the parol evidence rule excludes only evidence of the language used by the parties in making the contract other than that which is furnished by the instrument itself. * * *

"The parol evidence rule applies to exclude not merely oral utterances but also informal writings other than the single and final written memorial. The real objection to the use of parol evidence is not that it is oral as distinguished from written but that it is extrinsic and tends to prove what is not a term of the contract. * * * "

Thus the document here concerned could not be admitted into evidence to establish the lease of the minerals in the absence of very exceptional circumstances, it thus does not and cannot affect the title or possession of real property in the legal sense of those terms.

We are not questioning the quantum or quality of material contained in the document, though we note it does not purport to be prepared by a licensed abstracter nor the authentication of same, though we also note that the signatures thereof have not been acknowledged before a notary public.

On the basis that the document does not purport to be an "instrument" and it does not "affect the title to or possession of real property" it is our opinion that same is not entitled to be recorded in the register of deeds office pursuant to section 47-19-01 of the North Dakota Century Code, that the register of deeds may not record same and that any attempt at recording same would not serve to give "notice" to subsequent purchasers as prescribed by our recording act.

We hope the within and foregoing will be sufficient for your purposes.

Sincerely,

Allen I. Olson

Attorney General